

In the January 13, 2011, Award, ALJ Moore determined claimant sustained a compensable right shoulder injury on September 5, 2008. The ALJ further found that the evidence presented failed to establish an impairment rating attributable to neck complaints, or a work disability due to restrictions premised on those complaints, and as a result of the

work injury. Claimant alleges a work disability due to task loss and wage loss. The ALJ awarded claimant benefits based upon a 13% functional impairment to the right upper extremity at the level of the shoulder.

Claimant contends that her cervical spine injury necessitated her physician to impose permanent restrictions, which resulted in a task loss. Because claimant suffered a task loss and is no longer working, she asserts she is entitled to a work disability.

Respondent argues claimant has failed to prove that she sustained an injury to her cervical spine. Respondent requests the Board affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant suffer a cervical spine injury by accident arising out of and in the course of her employment?
2. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the regular hearing held on February 18, 2010, respondent indicated that it was denying claimant suffered a neck injury arising out of and in the course of her employment.¹ However, when the ALJ recited the issues to be decided he stated:

The Court: All right. Our issues then are underpayment of temporary total disability benefits on rate; unpaid medical expenses, within that dispute, whether those expenses are authorized or unauthorized; and then we have nature and extent, both functional, and that's a fight over a scheduled versus body as a whole, and then body as a whole, we have a work disability claim.

Mr. Mann: That's correct. Can we stipulate to the rating on the shoulder?

Mr. Mosier: 13 percent to the shoulder.

Mr. Mann: 13 percent to the shoulder.

Mr. Mosier: Yes I'd stipulate to that.²

¹ R.H.Trans. (Feb. 18, 2010) at 4.

² *Id.* at 7-8.

The ALJ indicated in the Award that the parties stipulated claimant suffered a personal injury by accident to her right shoulder on September 5, 2008.

In its brief to the Board, respondent listed as an issue whether claimant sustained a right shoulder injury only, or also suffered a neck injury. In its brief respondent stated, “In this case, Claimant has fallen short of carrying her burden to establish a cervical spine injury. The evidence proves a right shoulder injury only.”³

Claimant worked for respondent from June 28, 2005 to November 8, 2009. On September 5, 2008, claimant and another employee, who was also her lead-person, were pulling a large bin of pizzas, weighing approximately 400 pounds under a conveyor belt. As claimant and the other employee were pulling the bin, claimant felt a pop in her right shoulder. Claimant reported the incident to her lead-person, and was sent to the nurse’s station for assessment.

In January 2008, claimant fell down some steps at her home and saw Dr. Elaine Ferguson. She apparently complained to Dr. Ferguson, her family physician, of discomfort around her low neck, right shoulder and tailbone area.⁴ X-rays of the cervical spine were unremarkable. At Dr. Ferguson’s recommendation, claimant went to physical therapy and was prescribed Flexeril, but was not given restrictions nor did she miss any work.⁵

As delineated in the Award, claimant saw several physicians for treatment or medical examinations. This order will not replicate the ALJ’s detailed recitation of the claimant’s medical treatment, but would note several significant events in the medical history stemming from her injury.

Claimant initially received treatment from the nurse at the plant, which consisted of taking ibuprofen. When her pain did not diminish, claimant was seen by the “company” doctor, Dr. James J. Shafer. He initially saw claimant on September 25, 2008, diagnosed claimant with a right shoulder sprain and ordered physical therapy.⁶ Claimant did not improve and on October 9, 2008, Dr. Shafer ordered an MRI, which revealed a partial tear of the supraspinatus tendon, subdeltoid bursitis and a type-1 acromion impingement upon the subacromial fat stripe along with a questionable edema at the distal clavicle in the right

³ Respondent’s Brief at 6 (filed Mar. 4, 2011).

⁴ R.H. Trans. (Jul. 22, 2010) at 33-35.

⁵ *Id.* at 40-43.

⁶ Shafer Depo. at 8.

shoulder.⁷ Claimant was then referred by Dr. Shafer to Dr. Gary Harbin, an orthopedic surgeon, for treatment of her right shoulder.

Dr. Harbin performed an acromioplasty on November 14, 2008, and had claimant undergo post-surgery physical therapy. Following surgery, claimant continued to complain of pain in her right shoulder. In a progress note dated January 26, 2009, Dr. Harbin stated "From the time of the injury she has also had pain from the neck, shoulder, down into the hand."⁸ This was the first date that any physician recorded a complaint by claimant that she was suffering neck pain. He then recommended claimant undergo EMG/NCT tests, which were conducted on February 13, 2009, by Dr. Trent Davis. The EMG/NCT findings suggested chronic denervation and reinnervation involving C7, which claimant asserts is a positive finding of a neck injury. Dr. Davis recommended an MRI scan of the cervical spine, which was normal. Subsequently, Dr. Harbin referred claimant for a consultation to Dr. Ali Manguoglu, a neurosurgeon.

Dr. Manguoglu had Dr. William Kossow, a physiatrist, conduct new EMG/NCT tests on claimant. Claimant underwent EMG/NCT tests on April 15, 2009, and Dr. Kossow indicated the EMG/NCT findings were essentially normal. The electrodiagnostic studies showed no evidence of cervical radiculopathy, brachial plexopathy, carpal tunnel syndrome, cubital tunnel syndrome, axillary neuropathy, suprascapular neuropathy, nor any other peripheral nerve abnormality in the right upper extremity. He also tested the left upper extremity, compared it to the right upper extremity test results and noted no significant differences.⁹ Dr. Manguoglu sent a letter dated March 31, 2009, to Dr. Harbin indicating claimant had no evidence of a cervical problem.¹⁰

Claimant was last treated by Dr. Harbin on February 1, 2010. Dr. Harbin gave claimant a permanent functional impairment of 7-10% to the right upper extremity. He did not rate her cervical spine because "I basically turned her over to Dr. Manguoglu for her neck and he released her with no noted cervical problems, so I have no rating for the neck."¹¹ Claimant was sent to three physicians for medical examinations: Dr. Peter Bieri, Dr. Paul Stein and Dr. Edward Prostic.

Dr. Bieri examined claimant on March 17, 2009, and she had not yet seen Dr. Kossow or Dr. Manguoglu. Dr. Bieri opined claimant had impingement syndrome and a

⁷ *Id.*, Ex. 2.

⁸ Harbin Depo., Ex. 2 at 5.

⁹ Kossow Depo. at 9.

¹⁰ Harbin Depo. at 30.

¹¹ *Id.* at 14.

possible right rotator cuff of the right shoulder. He also indicated claimant had undergone nerve conduction tests which were consistent with C7 radiculopathy on the right and carpal tunnel syndrome at the level of the right wrist.

\ Dr. Bieri reexamined claimant on June 22, 2009. His diagnosis was C7 radiculopathy on the right upper extremity, chronic cervical strain, myofascial pain, impingement syndrome of the right shoulder and improved, but persistent elements of C7 radiculopathy into the right upper extremity. Dr. Bieri opined that according to the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, DRE Cervico-thoracic Category II, claimant has a 5% functional impairment to the body as a whole based upon intermittent or continuous muscle guarding, nonuniform loss of range of motion and nonverifiable radicular complaints.¹²

Claimant also received an 8% right upper extremity impairment due to range of motion deficits of the right shoulder and a 5% right upper extremity impairment due to residuals of C7 radiculopathy which results in a 13% impairment to claimant's right upper extremity. Dr. Bieri further opined claimant's right shoulder and neck injuries were caused by claimant's September 5, 2008, accident.¹³ He restricted claimant from shoulder level and overhead use on the right to no more than occasionally, and lifting to no greater than chest level.

At the request of claimant's attorney, Dr. Paul Stein, a neurologist certified by the American Board of Neurological Surgery, conducted a medical examination of claimant on December 3, 2009. Dr. Stein opined there was no mechanism of injury to claimant's neck, and his physical examination of claimant revealed no injury to the neck. Dr. Stein's explanation of why he did not assign claimant an impairment to her cervical spine is significant:

Q. (Mr. Mosier) Now, concerning the cervical spine in your report of December 3, 2009, which is Deposition Exhibit Number 2, did you conclude that there was a work injury occurring at Schwan's for which a functional impairment rating should be assigned for the cervical spine?

A. (Dr. Stein) I did not.

Q. (Mr. Mosier) And, Doctor, how did you arrive at that decision?

A. (Dr. Stein) First of all, the mechanism of injury was to the shoulder. The patient had a specific injury to the shoulder. There was no real mechanism of injury to the neck itself. The physical examination did not document evidence of an injury to the

¹² Bieri Depo. (Sep. 27, 2010) at 29-30.

¹³ Bieri Depo. (Aug. 9, 2010), Ex. 3.

neck. And there was, I think, a lot of the questioning came up because there was one EMG report which showed some, a few polyphasic waves. And the examiner who did that report, a notation in the report suggests chronic denervation and reinnervation of C7 root muscles. I think the key word there is suggests because the AMA Guides have a specific indication in the guides as to what EMG findings are required to make a diagnosis of radiculopathy. And this EMG did not show fibrillations, positive sharp waves, things of that nature. In addition the patient had a second EMG which was reported.

Q. (Mr. Mosier) If I might interject before you go on. Is that the report of the EMG/NCT report of Dr. Trent Davis dated February 13?

A. (Dr. Stein) That's the first one, yes.

Q. (Mr. Mosier) Okay. I am sorry to interrupt you. Go ahead.

A. (Dr. Stein) There was a subsequent EMG nerve conduction test which was reported as normal. Given that the findings on the first one were not diagnostic and the second one was normal, I could not make a case for that.¹⁴

Dr. Stein also observed that claimant's MRI showed no evidence of nerve root compression. Dr. Stein testified that his physical examination of claimant, the findings from both EMG/NCTs and claimant's MRI, caused him to conclude claimant did not suffer a C7 nerve root injury or a brachial stretch injury.¹⁵ Dr. Stein gave claimant no restrictions for her neck.

Dr. Prostig opined claimant has a 15% permanent functional impairment to the body as a whole as a result of a cervical spine injury and carpal tunnel syndrome. He placed her in DRE Category III because of radiculopathy. He also gave claimant a 9% permanent functional impairment to the right upper extremity. The cervical spine impairment and right upper extremity impairments combine for a 22% permanent functional impairment to the body as a whole.¹⁶ He indicated that under the DRE approach in the *AMA Guides* if the diagnosis is made by EMG/NCT findings and the patient completely recovers, the diagnosis and thus the permanent impairment rating would persist.¹⁷

Dr. Prostig indicated that claimant had a gradual worsening of the neck condition caused by the work accident, but could not state whether it was caused predominantly by

¹⁴ Stein Depo. at 10-11.

¹⁵ *Id.* at 12-13.

¹⁶ Prostig Depo. (Aug. 13, 2010) at 11.

¹⁷ *Id.* at 20.

the specific event of the work accident or treatment for the injury.¹⁸ Dr. Prostic restricted claimant to lifting 30 lbs. occasionally to shoulder height or half of that amount to shoulder height frequently, and no over-the-shoulder activities with her right upper extremity.

**Did claimant suffer a personal injury by accident
arising out of and in the course of her employment?**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁹ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”²⁰

In order for a claimant to collect workers compensation benefits he/she must suffer an accidental injury that arose out of and in the course of his/her employment. The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.²¹

The ALJ determined the weight of the evidence fails to establish claimant suffered a rateable impairment of function to her cervical spine as a result of the September 5, 2008, accident. Although the ALJ does not specifically state that claimant suffered a personal injury by accident that arose out of and in the course of her employment, the foregoing statement and additional language in the remainder of the Award imply that he made such a finding.

The ALJ found it significant that claimant first complained of neck pain on January 26, 2009, to Dr. Harbin, which was nearly four months after the accident. The ALJ also considered the fact that claimant fell at home in January 2008, but never reported that the fall that produced neck and shoulder pain, to any of the physicians who saw her. In the Award, the ALJ stated:

¹⁸ Prostic Depo. (Sep. 27, 2010) at 39.

¹⁹ K.S.A. 2008 Supp. 44-501(a).

²⁰ K.S.A. 2008 Supp. 44-508(g).

²¹ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Hovering in the background is claimant's fall at home in January 2008, that produced neck pain and right shoulder pain. Claimant's Regular Hearing testimony is contradictory as to whether those complaints had resolved before her work-related injury. That incident, injury and resulting complaints were never reported to any of the doctors Claimant consulted for rating opinions.²²

The Board finds that claimant did not suffer a neck injury that arose out of and in the course of her employment. The first documented complaint of a neck injury was some four months after the claimant's accident. Claimant suffered a fall at home in January 2008, which produced neck and shoulder pain. Drs. Bieri and Prostic were apparently unaware of claimant's January 2008 fall, when they rendered their diagnosis of claimant and opinions as to causation of her injuries.

Dr. Stein's physical examination of claimant did not reveal a mechanism of neck injury to claimant's neck. Dr. Stein's testimony is persuasive, as he is the only physician who made a detailed review of claimant's EMG/NCTs. The findings of claimant's first EMG/NCT, (conducted by Dr. Davis) only suggested evidence of chronic denervation and reinnervation involving C7. Claimant's second EMG/NCT (conducted by Dr. Kossow) findings are normal. Drs. Bieri and Prostic appear to trivialize the EMG/NCT findings of Dr. Kossow, and rely unduly on the findings from claimant's first EMG/NCT. They ignore the opinion of Dr. Manguoglu that claimant did not suffer a neck injury.

What is the nature and extent of claimant's disability?

Since the Board found claimant did not suffer a neck injury arising out of and in the course of her employment, the issue of nature and extent of claimant's work disability is moot.

CONCLUSION

1. On September 5, 2008, claimant suffered a personal injury to her right shoulder which arose out of and in the course of her employment.
2. As a result of the aforementioned accident, claimant suffered a 13% permanent functional impairment to her right shoulder.
3. Claimant did not suffer a neck injury arising out of and in the course of her employment.
4. Future medical benefits will be considered upon proper application.

²² ALJ Award (Jan. 13, 2011) at 10.

5. The ALJ's finding approving attorneys fees and concerning Scott Price's lien for attorneys fees are affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the January 13, 2011, Award entered by ALJ Bruce E. Moore regarding claimant's neck injury and affirms the 13% permanent impairment to her right shoulder.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge

²³ K.S.A. 2010 Supp. 44-555c(k).